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Nos. 86-231, 86-253

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PENSION BENEFIT GUARANTY CORPORATION

and

UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN, *et al.*,
Appellants

v.

YAHN & MCDONNELL, INC. and THE PENNSTAR COMPANY,
Appellees

On Appeal from the United States Court of Appeals for the Third Circuit

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MOTION TO AFFIRM

CARL L. TAYLOR
Counsel of Record
GLENN SUMMERS
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000

WILLIAM H. EWING
HANGLEY CONNOLLY EPSTEIN
CHICCO FOXMAN & EWING
1429 Walnut Street
14th Floor
Philadelphia, PA 19102
(215) 864-7700

Counsel for Appellees Yahn & McDonnell, Inc. and The Pennstar Company

Dated: November 6, 1986

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JURISDICTION

The judgment of the court of appeals (J.S. App. 50a-51a) was entered on March 31, 1986. A petition for rehearing filed by the Pension Benefit Guaranty Corporation ("PBGC"), which was allowed by the court below to intervene (J.S. App. 52a-53a), was denied on April 23, 1986 (J.S. App. 54a-55a). The PBGC filed a notice of appeal in No. 86-231 on May 21, 1986 (J.S. App. 56a-57a). On July 9, 1986, Justice Brennan extended the time for docketing the appeal to and including August 19, 1986, and the appeal was docketed on August 14, 1986. The appellants in No. 86-253, United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan,

et al., filed a notice of appeal on May 20, 1986, which was docketed on August 18, 1986.

The court below held that section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1401(a)(3)(A) (1982) is unconstitutional because it deprives the employer of "an impartial decisionmaker" (J.S. App. 21a) and thus falls foul of such decisions as *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), *Gibson v. Berryhill*, 411 U.S. 564 (1973), and *Tumey v. Ohio*, 273 U.S. 510 (1927), among others. Since an Act of Congress was held by the court below to be unconstitutional, the case falls squarely within the provision of 28 U.S.C. § 1252 (1982). Consequently, there is no basis to contest the jurisdiction of this Court if the question is a substantial one.

Because the decision below is in conflict with decisions of five other courts of appeals, and there are sharp divisions in the *en banc* review in two of these courts, the appellee does not feel that it can be seriously contended that the question is not substantial.

Accordingly, it appears that the Court has jurisdiction of the appeal.

MOTION TO AFFIRM

The question at issue in this case, though of constitutional dimension, is a relatively narrow one, and may not warrant plenary consideration in this Court. Nevertheless, it is a recurring question and should be definitively settled by a decision of this Court. Accordingly, the appellees move that the decision below should be affirmed.

The reasons for this motion are well stated by Judge Becker in his opinion for the majority below (*see* particularly, J.S. App. 18a-28a) and in the dissenting opinion of Judge Aldrich in *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137, 1148 (1st Cir. 1985). These opinions relied primarily on such cases as *Gibson v. Berry-*

hill, 411 U.S. 564 (1973), *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), and *Tumey v. Ohio*, 273 U.S. 510 (1927). *See also Schweiker v. McClure*, 456 U.S. 188 (1982); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Friedman v. Rogers*, 440 U.S. 1 (1979).

In response to the decision below, the PBGC contends that pension plans can act impartially and may sometimes make decisions to reduce liability. However, the plan trustees "bear[] an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).[1] The legislative history demonstrates that Congress expected pension plans to act as ordinary litigants pursuing their statutory self-interest:

> We do not intend to restrict plan sponsors' prudent exercise of judgment in administering the withdrawal liability provisions generally. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of any responsible creditor concerned with maximizing the total ultimate recovery at supportable costs. 126 Cong. Rec. 23,288 (1980) (remarks of Senator Williams, MPPAA co-sponsor).

That a "responsible creditor" acting "prudent[ly]" to "maximiz[e] the total ultimate recovery" may sometimes make decisions that lessen liability does not mean he may sit as judge on his own case.

The PBGC contends that the trustees cannot put their bias into effect, because some actuarial decisions are delegated to the plan actuary. It is hard to see how a defect in the statute can be cured by a further delegation to an entrepreneur who owes his appointment to the trustees. The PBGC's own source shows that there is great variation among actuaries on the critical actuarial as-

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[1] Remarkably, neither the PBGC nor the Plan cited *Amax Coal* in their respective Jurisdictional Statements.

sumptions, and a plan is free to shop for an actuary whose "philosophy" fits the plan's.[2]

The PBGC contends that the plan cannot effectuate its bias in applying statutory exemptions, because legal determinations are not subject to the presumption. That begs the question. There is no basis in law or policy to shield the plan's factual determinations that underlie whether, on a case-by-case basis, a particular exemption does or does not apply.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

CARL L. TAYLOR
Counsel of Record
GLENN SUMMERS
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000

WILLIAM H. EWING
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[2] General Accounting Office, Report to the Congress, Effects of Liabilities Assessed Employers Withdrawing From Multiemployer Pension Plans (1985), at 24. The Report also notes: "Notwithstanding the variables inherent in the determination of a plan's withdrawal liability, MPPAA provides that a plan's determination is presumed correct in disputes resulting in arbitration unless the employer can show that it is unreasonable or in error." *Id.*